

BEFORE THE  
COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR BOARD OF  
CONTROL DECISION ON:

Statutes 1980, Chapter 1143  
Claim No. 3929

Directed by Statutes 2004,  
Chapter 227, Sections 109-110  
(Sen. Bill No. 1102)

Effective August 16, 2004

Case No. 04-RL-3929-05

***Regional Housing Needs  
Determination-Councils of  
Governments***

**REBUTTAL BRIEF OF SOUTHERN  
CALIFORNIA ASSOCIATION OF  
GOVERNMENTS, SACRAMENTO  
AREA COUNCIL OF  
GOVERNMENTS, ASSOCIATION OF  
BAY AREA GOVERNMENTS,  
CALIFORNIA ASSOCIATION OF  
COUNCILS OF GOVERNMENTS,  
AND SAN DIEGO ASSOCIATION  
OF GOVERNMENTS**

HEARING DATE: March. 31, 2005

**I. INTRODUCTION**

The Southern California Association of Governments ("SCAG"), the Association of Bay Area Governments ("ABAG"), the Sacramento Area Council of Governments ("SACOG"), the California Association of Councils of Governments ("CALCOG"), and the San Diego Association of Governments ("SANDAG"<sup>1</sup>, (collectively (the "COGs") jointly submit this brief to respond to comments made by the Department of Finance ("DOF") and Senator Denise Moren Ducheny. Specifically, the COGs take issue with the argument that

<sup>1</sup> Although SANDAG became a statutorily created agency pursuant to Public Utilities Code Sections 132354 et seq. on January 1, 2003, prior to this date, it was a joint powers agency. Because the reimbursement claims predate January 1, 2003, the arguments set forth herein apply to SANDAG.

1 Government Code Section 65584.1 precludes the COGs from seeking  
2 reimbursement through the state mandate process pursuant to SB  
3 90. See Cal. Const. Art. 13B § 6.

4 As recognized by DOF, the COGs are joint power agencies  
5 ("JPAs") made up of constituent cities and counties that  
6 voluntarily become members of the JPAs. Although Section 65584.1  
7 purportedly allows COGs to recover their RHNA costs by charging  
8 their members, this hardly results in any sort of reimbursement  
9 because the COGs would effectively pay for the RHNA process  
10 themselves. This runs counter to the well-established policy  
11 underlying SB 90, i.e., that states cannot shift the costs of  
12 providing public services to local agencies.

13 Furthermore, since the COGs are governed by JPA agreements  
14 among their members, they have no authority to assess fees upon  
15 their members unless the agreements set forth this authority.  
16 None of the COGs' JPA agreements empower the COGs with such fee  
17 authority. Thus, even after the enactment of Section 65584.1,  
18 without any amendments to their respective JPA agreements, the  
19 COGs have no authority to impose fees on their members. The  
20 Legislature simply cannot force the COGs to exercise this  
21 authority because by doing so, it would unconstitutionally  
22 interfere with the JPA agreements. See Cal. Const. Art. 1 § 9.

23 It is indisputable that the RHNA program is a state program  
24 that was created to address the affordable housing shortage in  
25 California. Through the RHNA process, each local jurisdiction is  
26 assigned a "fair share" of housing through a process administered  
27 by regional councils of government or "COGs". Notably, for areas  
28

1 without COGs, the State, through the Department of Housing and  
2 Community Development, determines the cities and counties' share  
3 of housing need. See Cal. Govt. Code § 65584(b). This clearly  
4 demonstrates that it is in the State's interest, not the cities'  
5 and counties' interest, to complete the RHNA process. It would  
6 be contrary to the policies underlying SB 90 to force local  
7 agencies to shoulder the costs of this state service.

8 Finally, even assuming arguendo that the COGs somehow have  
9 the authority to charge its members fees to perform the RHNA, the  
10 member cities and counties cannot pass the fees on to developers.  
11 Although cities and counties can levy fees to offset costs  
12 expended by their own planning agencies, they have no authority  
13 to levy fees to offset costs incurred by other agencies such as  
14 the COGs. Moreover, since the preparation of the RHNA by the  
15 COGs does not provide a direct benefit to the developers, it will  
16 be difficult, if not impossible to determine the "reasonable cost  
17 of providing the service."

18 As DOF recognizes, funds have in the past been appropriated  
19 and paid to COGs for the RHNA program, and there is no reason to  
20 deviate from this practice since the RHNA is clearly a state-  
21 mandated program. None of the State's and the COGs' obligations  
22 have changed; the only difference is the enactment of Section  
23 65584.1. Notwithstanding the provisions of Section 65584.1, the  
24 COGs do not have the authority to impose the RHNA fees on its  
25 members without approval from its members, nor do the members  
26 have the authority to impose the fees on developers. Therefore,  
27 the Commission on State Mandates ("Commission") should affirm its  
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1 prior finding that the costs incurred by COGs in the RHNA process  
2 are reimbursable mandated costs.

3  
4 **11. ARGUMENT**

5 **A. The COGs are Governed by Their JPA Agreements Which do**  
6 **not Allow the COGs to Charge the Fees set forth in**  
7 **Section 65584.1**

8 COGs are JPAs established pursuant to the Joint Exercise of  
9 Powers Act (Cal. Govt. Code § 6500 *et seq.*) and are formed when  
10 the member agencies enter into joint powers agreements ("JPA  
11 Agreements"). The JPA Agreements, as agreed to by all the  
12 members, set forth the scope of the COGs' powers. The  
13 Legislature cannot, simply by enacting new legislation, authorize  
14 the COGs to levy fees against their members. Any fee to be  
15 charged must be authorized by the COGs' respective JPA  
16 Agreements, and therefore, must be approved by each of the member  
17 agencies. However, none of the COGs' JPA Agreements allow the  
18 COGs to charge any fee.

19 For example, SCAG's JPA Agreement states:

20 "Powers of Association. The Association shall have  
21 the power, in its own name, to make and enter into  
22 contracts, to employ agents and employees, to acquire,  
23 hold an dispose of property, real and personal, to sue  
24 and be sued in its own name, and to incur debts,  
25 liabilities or obligations necessary for the  
26 accomplishment of the purposes of this agreement . . .  
27 ."

1 Southern California Association of Governments Agreement at 2  
2 (attached as Exhibit A to Declaration of Patricia J. Chen in  
3 Support of Rebuttal Brief of Southern California Association of  
4 Governments, Sacramento Area Council of Governments, Association  
5 of Bay Area Governments, California Association of Councils of  
6 Governments, and San Diego Association of Governments ("Chen  
7 Declaration"))<sup>2</sup>.

8 Nevertheless, Section 65584.1 purports to grant the COGs  
9 authority to charge their members fees to perform the RHNA:

10 "Councils of government may charge a fee to local  
11 governments to cover the projected reasonable, actual  
12 costs of the council in distributing regional housing  
13 needs pursuant to this article . . . ."

14 Govt. Code § 65584.1. Such authority is not set forth in the JPA  
15 Agreements, and because the COGs are governed solely by these  
16 agreements, the Legislature cannot unilaterally require the COGs  
17 to exercise this authority. See Govt. Code § 6503 (requiring JPA  
18 agreements to set forth purpose, method, and power to be  
19 exercised by the JPA).

20 In fact, by purporting to grant the COGs authority in excess  
21 of the JPAs, the Legislature is in violation of the Contract

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22 <sup>2</sup> Although the COGs' joint powers agreements and/or bylaws provide for the  
23 assessment of membership dues, they do not set forth any fee authority beyond  
24 this. See e.g. Bylaws of the Southern California Association of Governments  
25 at 18 (attached hereto as Exhibit B to Chen Declaration). Furthermore, note  
26 that amending the JPA Agreements would be incredibly difficult, if not  
27 impossible. For example, SCAG has 193 members. All 193 members must agree to  
28 SCAG's authority to charge the RHNA fee in order to amend SCAG's JPA  
Agreement. If even one member disagrees, the amendment would fail. See SCAG  
JPA Agreement at ¶9 ("This agreement may be amended at any time by the written  
agreement of all parties to it") (attached as Exhibit "A" to Chen  
Declaration). Moreover, it would take an inordinate amount of time for 193  
legislative bodies to approve any such amendment.

1 Clause of the state Constitution, which states that a "law  
2 impairing the obligation of contracts may not be passed." Cal.  
3 Const. Art. 1, § 9. As discussed by the League of Cities, the  
4 Legislature may not interfere with the terms of the JPA  
5 Agreements by forcing the COGs to exercise authority that  
6 contradicts the terms of the agreements.

7 Note that even if the COGs' member agencies approved the  
8 COGs authority to charge the "fee" pursuant to Section 65584.1,  
9 this fee would not be a fee for service; rather, it would simply  
10 be a voluntary agreement by the member agencies to pay for the  
11 cost of the regional housing needs assessment with local proceeds  
12 of taxes. Thus, 65584.1 places the burden of paying for the  
13 RHNA, a state mandated program, directly on the COGs themselves  
14 by imposing the costs on their members. This is specifically the  
15 type of burden on local tax revenue that SB 90 sought to prevent.  
16 See San Diego Unified School District v. Commission on State  
17 Mandates, 33 Cal.4<sup>th</sup> 859, 875 (2004) (SB 90 "was intended to  
18 preclude the state from shifting to local agencies the financial  
19 responsibility for providing public services in view of  
20 restrictions on the taxing and spending power of the local  
21 entities.") (quoting County of Los Angeles v. State of  
22 California, 43 Cal.3d 46, 56-57 (1987)); see also Redevelopment  
23 Agency of the City of San Marcos v. California Commission on  
24 State Mandates, 55 Cal.App.4<sup>th</sup> 976, 985 (1997) ("A central purpose  
25 of section 6 is to prevent the state's transfer of the cost of  
26 government from itself to the local level.").

1       The RHNA program is a state program that was created to  
2 address the affordable housing shortage in California. The COGs  
3 administer the regional portions of the program under the  
4 oversight and ultimate responsibility of HCD. See Govt. Code §  
5 65584(a) ("The appropriate council of governments shall determine  
6 the share for each city or county consistent with the criteria of  
7 this subdivision and with the advice of [HCD] . . . .") However,  
8 the State (via HCD) is ultimately responsible for determining the  
9 regional share of the statewide housing need. See id. ("[HCD]  
10 shall determine the regional share of the statewide housing need  
11 . . . .")

12       Notably, for areas without COGs, HCD determines the cities'  
13 and counties' share of housing need. See Cal. Govt. Code §  
14 65584(b). There is no requirement for these cities and counties  
15 to perform the RHNA, though they may agree to accept the  
16 responsibility. See id. Thus, it is in the State's interest,  
17 not the local agency, to complete the RHNA. This clearly  
18 demonstrates that Section 65584.1 thrusts the costs of state  
19 services onto local agencies, contrary to SB 90.

20  
21       B.   The City of El Monte v. Commission on State Mandates  
22           and Redevelopment Agency v. Commission on State Mandates  
             are Inapposite to the Present Case

23       Senator Ducheny and DOF both suggest in their letters to the  
24 Commission that, based on the court decisions in Redevelopment  
25 Agency of the City of San Marcos v. Commission on State Mandates,  
26 55 Cal.App.4th 976 (1997) ("San Marcos") and City of El Monte v.  
27 Commission on State Mandates, 83 Cal.App.4th 266 (2000) ("El

1 Monte"), COGs are ineligible for reimbursement through the state  
2 mandate process. The two cases cited have no application to the  
3 present case.

4 Both cases address whether redevelopment agencies are  
5 eligible for state reimbursement based on a legislatively  
6 mandated shifting of tax increment funds. Tax increment is the  
7 primary method of financing used by redevelopment agencies. Tax  
8 increment revenues are funds received from property tax revenues  
9 above a specific baseline set at the time the redevelopment  
10 project is adopted. (Health & Safety Code §33670.) Pursuant to  
11 Article 16, section 16 of the California Constitution,  
12 redevelopment agencies are authorized to use tax increment  
13 revenues for redevelopment projects. In San Marcos, the court  
14 addressed whether a legislative requirement that 20% of tax  
15 increment be set aside for the development of affordable housing  
16 constituted a reimbursable state mandate. In El Monte, the court  
17 addressed whether a legislative requirement that a certain amount  
18 of tax increment revenue be shifted to local school and community  
19 college districts constituted a reimbursable state mandate.

20 In both cases, the courts noted that Health and Safety Code  
21 section 33678 specifically states that tax increment revenue does  
22 not constitute proceeds of taxes for purposes of Article 13B of  
23 the California Constitution. As a result, tax increment revenues  
24 are not subject to the expenditure limitations set forth in  
25 Article 13B, and mandated expenditures of tax increment revenue  
26 are not subject to reimbursement under Article 13B, section 6.  
27 Thus, the redevelopment agencies were not eligible for  
28



1 reimbursement of tax increment revenue shifted by the Legislature  
2 for a specific use.

3 COGs, on the other hand, do not receive revenue from tax  
4 increment. They receive funds through membership dues paid by  
5 their member agencies, all of which are cities and counties. The  
6 member agencies pay their dues with general tax revenues.<sup>3</sup> If  
7 the Legislature requires that the COGs pay for the costs incurred  
8 during the RHNA process, then the COGs will be required to turn  
9 to their member agencies for increased funding. This funding  
10 will come from general tax revenues of the member agencies.  
11 These revenues are the very revenues that Article 13B, section 6  
12 is intended to protect. Therefore COGs, unlike redevelopment  
13 agencies, are eligible for reimbursement of state mandated costs.

14 C. Even if the COGs Could Somehow Charge the RHNA Fee to  
15 Its Members, the Members, Could Not Pass the Fees onto  
16 Developers

17 Government Code Section 65584.1 allows a city, county, or a  
18 city and county to

19 "charge a fee, including, but not limited to, a fee  
20 pursuant to Section 65104 to support the work of the  
21 planning agency pursuant to this article, and to  
22 reimburse it for the cost of any fee charged by the  
23 council of government to cover the council's actual  
24 costs in distributing regional housing needs."<sup>4</sup>

25  
26 <sup>3</sup> In general, member agencies pay for their membership dues using their  
27 general tax revenues.

28 <sup>4</sup> Section 65104 states:

"The legislative body shall provide the funds, equipment, and

1 Govt. Code § 65584.1 (emphasis added).

2 Furthermore, Section 65584.1 requires that "[t]he  
3 legislative body of the city, county, or city and county shall  
4 impose any fee pursuant to Section 66016." Section 66016 states:

5 "no local agency shall levy a new fee or service  
6 charge or increase an existing fee or service charge  
7 to an amount which exceeds the estimated amount  
8 required to provide the service for which the fee or  
9 service charge is levied."

10 Govt. Code § 66016(a).

11 Section 65584.1 appears to attempt to pass the costs of the  
12 RHNA determination through to developers, by authorizing local  
13 agencies to charge a fee pursuant to 65104 to "support the work  
14 of the planning agency pursuant to this article, and to reimburse  
15 it for the cost of any fee charged by the council of government  
16 to cover the council's actual costs in distributing regional  
17 housing needs." (Govt. Code §65584.1.) This authority, like the  
18 authority granted the COGs to charge their members, is illusory.  
19 First, Sections 65104 and 66016 authorize the levy of a fee to  
20 offset expenses incurred by the planning agency. There is no  
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22  
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24 accommodations necessary or appropriate for the work of the  
25 planning agency. If the legislative body, including that **of** a  
26 charter city, establishes any fees to support the work of the  
27 planning agency, the fees shall not exceed the reasonable cost of  
providing the service for which the fee is charged. The  
legislative body shall impose the fees pursuant to Section  
66016."

28 Govt. Code § 65104.

1 authority to offset costs incurred by other agencies, such as the  
2 COGs.

3       Second, as outlined in the letter submitted by the League of  
4 California Cities, cities and counties would likely be unable to  
5 quantify the appropriate fee to charge local developers. Because  
6 the preparation of the RHNA does not provide a benefit directly  
7 to the developers, it will be extremely difficult, if not  
8 impossible, to quantify a fee that will not "exceed the  
9 reasonable cost of providing the service" to developers. Cities  
10 and counties would first have to determine the extent to which  
11 various types of development would benefit from the preparation  
12 of the RHNA in their respective communities. Second, cities and  
13 counties would have to project the amount of development that  
14 will occur within their communities over the period of time for  
15 which the RHNA applies. Cities and counties could not make these  
16 projections with any degree of certainty, and therefore could not  
17 calculate a fee that would accurately and fairly allocate the  
18 cost of the RHNA to developers. As a result, cities and counties  
19 are likely to either overcharge developers for the cost of the  
20 RHNA, and violate Government Code section 65104, or undercharge  
21 developers, and be forced to absorb the cost of preparing the  
22 RHNA.  
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26       Finally, the purported authority to levy fees against  
27 developers does not provide cities and counties with the ability  
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1 to recover costs in the same manner as the fee authority at issue  
2 in Connell v. Superior Court, 59 Cal.App.4th 382 (1997). The  
3 "fee" authorized by Section 65584.1 is entirely different than  
4 the legitimate passing through of costs to end users, as upheld  
5 in Connell. In Connell, the State Department of Health Services  
6 increased the level of purity required before reclaimed water  
7 could be used for certain irrigation purposes. Several water  
8 districts in Southern California asserted that the requirement  
9 resulted in a reimbursable state mandate, because the districts  
10 would be required to upgrade their reclamation facilities in  
11 order to meet the new purity standards. The Court determined  
12 that, because the water districts had explicit authority to  
13 increase fees to the end users of the reclaimed water, the water  
14 districts were not entitled to a reimbursement, based on the  
15 exception set forth in Revenue and Taxation Code section 2253.2  
16 (now Government Code section 17556).

19 The water agencies were able to charge a fee to end users  
20 for a specific service. In the present case, however, cities and  
21 counties are expected to pass costs through to developers who are  
22 building homes in those cities and counties. Thus, the ability  
23 of cities and counties to recover their costs is entirely  
24 dependent on the extent to which developers are operating in any  
25 given community. Cities and counties will likely be unable to  
26 accurately predict the extent of development activity in their  
27 community over a given period of time. As a result, cities and  
28

1 counties are nearly certain to either (1) underestimate the fees  
2 necessary to pay the cost of the RHNA, and thereby be obligated  
3 to use local tax revenues to pay at least a portion of the cost  
4 of the RHNA, or (2) charge developers too much for the cost of  
5 conducting the RHNA, and thereby violate the requirement that the  
6 fees under 65104 not exceed the cost of service. Because Section  
7 65584.1 does not provide adequate authority to levy fees to  
8 offset the cost of conducting the RHNA, the Commission should  
9 continue to reimburse the COGs for the cost of conducting the  
10 RHNA.

11 ///

1                   **III. CONCLUSION**

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3           The COGs are governed solely by their JPA agreements which

4 do not provide the COGs with authority to charge its members fees

5 for performing the RHNA. The Legislature simply cannot force the

6 COGs to exercise authority that they do not possess. Nor can the

7 Legislature authorize the COGs members to pass on the costs to

8 developers since these costs were not incurred by the members

9 themselves, but rather, the COGs. The RHNA was created to

10 address the affordable housing shortage in the State and the

11 ultimate responsibility for the RHNA lies with the State. As

12 such, it is unquestionably a state mandated program and in light

13 of the invalidity of Section 65584.1, the COGs must be allowed

14 reimbursement of its costs.

15 Dated: January 10, 2005

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21 By 

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22 Attorneys for Southern California

23 Association of Governments and on

24 behalf of Sacramento Area Council

25 of Governments, Association of Bay

26 Area Governments, California

27 Association of Councils of

28 Governments, and San Diego

Association of Governments

1 PROOF OF SERVICE

2 I, Cynthia Pacheco, declare:

3 I am a citizen of the United States and employed in Los  
4 Angeles County, California. I am over the age of eighteen years  
5 and not a party to the within-entitled action. My business  
6 address is 865 South Figueroa Street, 29th Floor, Los Angeles,  
7 California 90017. On January 10, 2005, I served a copy of the  
8 within document(s):

9  
10 **Rebuttal Brief of Southern California**  
11 **Association of Governments, Sacramento Area**  
12 **Council of Governments, Association of Bay**  
13 **Area Governments, California Association of**  
14 **Councils of Governments, and San Diego**  
15 **Association of Governments**

16  
17 ☒ (By Federal Express) I placed the document(s) listed  
18 above in a sealed Federal Express envelope affixed with  
19 a pre-paid air bill, and caused the envelope to be  
20 delivered to a Federal Express agency for delivery as  
21 set forth below.

22  
23 Eric D. Feller, Esq.  
24 Commission State Mandates  
25 980 9th Street, #300  
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28 I declare under penalty of perjury under the laws of the  
State of California that the above is true and correct.

Executed on January 10, 2005, at Los Angeles, California.

24  
25   
26 Cynthia Pacheco